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E-filed 2/8/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 INTERNATIONAL ALLIED PRINTING
11 TRADES ASSOCIATION; NORTHERN
12 CALIFORNIA ALLIED PRINTING TRADES
13 COUNCIL, an agent of the International Allied
14 Printing Trades Association,

Case No. C05-02947 HRL

**ORDER DENYING PLAINTIFFS'
MOTION FOR RELIEF FROM
VOLUNTARY DISMISSAL**

Plaintiffs,

v.

15 AMERICAN LITHOGRAPHERS, INC.,

16 Defendant.

17 _____ /
18 **I. Introduction**

19 International Allied Printing Trades Association and Northern California Allied Printing
20 Trades Council (jointly, "plaintiffs") move this court pursuant to Fed. R. Civ. P. 60(b) for relief
21 from a stipulated voluntary dismissal. Defendant American Lithographers opposes the motion.
22 Based on the papers submitted and the arguments of counsel at the February 7, 2006 hearing,
23 the court issues the following order.

24 **II. Background**

25 Several months into this trademark infringement case, defendant extended a settlement
26 offer to plaintiffs by letter to plaintiffs' counsel. The letter stated:

27 In the spirit of resolving all outstanding matters between our clients, American
28 Lithographers is willing to withdraw the Unfair Labor Practices Charge it filed
with the National Labor Relations Board (designated as Case No. 32-CB-5974-1)
with prejudice if you will dismiss with prejudice the Complaint you filed against
it in the United States District Court.

1 *See* Rediger Decl. in Support of Defendant's Opp., Ex. 1. Plaintiffs' counsel responded by letter
2 that he would discuss the offer with his clients. *See id.* at Ex. 2. Then, on November 4, 2005,
3 plaintiffs' counsel wrote the following: "This will confirm that I have been authorized, pursuant
4 to your earlier offers, now that the NLRB case has been withdrawn, to stipulate the dismissal of
5 this matter. Please draw up an appropriate Stipulation to Dismiss." *See id.* at Ex. 3.

6 On November 10, 2005, through the court's e-filing system, plaintiffs' counsel filed a
7 "Stipulation of Dismissal of Entire Action with Prejudice Against Defendant American
8 Lithographers, Inc. Pursuant to Federal Rule of Civil Procedure 41(a)(1)." Counsel also filed a
9 "Proposed Order for the Dismissal of Entire Action with Prejudice" for the court to execute.
10 Because plaintiffs' filing under Fed. R. Civ. P. 41(a)(1) operated to dismiss the suit, no further
11 action was required by the court to effectuate the parties' agreement, and the clerk closed the
12 file.

13 Plaintiffs now move the court for relief from the voluntary dismissal pursuant to Fed. R.
14 Civ. P. 60(b)(1). They claim that plaintiffs' counsel intended that the matter would be dismissed
15 *without* prejudice, and his signing and filing of a stipulation stating otherwise was an error
16 constituting "excusable neglect" within the meaning of the Rule.¹

17 **III. Legal Standard**

18 Federal Rule of Civil Procedure 60(b) provides, in part: "On motion and upon such
19 terms as are just, the court may relieve a party or a party's legal representative from a final
20 judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or
21 excusable neglect."

22 There is no *per se* rule governing what constitutes "mistake, inadvertence, surprise, or
23 excusable neglect" and district courts are instructed to take into account all the circumstances
24 surrounding a party's act or omission. *See Pioneer Investment Services v. Brunswick
Associates*, 507 U.S. 380, 395 (1993) (analyzing the term "excusable neglect" in the context of

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28 ¹At the hearing on this motion, plaintiffs' counsel suggested that rather than a "clerical error" as they
represented in their moving papers, this was a "miscommunication" or "failure of the 'meeting of the minds.'"

¹ Fed. R. Bankr. P. 9006(b)); *see also Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (analyzing the term "excusable neglect" in the context of Fed. R. Civ. P. 4(a)(1)(A)).²

3 || IV. Discussion

4 The question presented here is whether this court should exercise its discretion under
5 Rule 60(b) and convert the stipulation of dismissal with prejudice to one without.³ Plaintiffs
6 insist that its mistake was due to a "miscommunication." However, the facts of this case
7 suggest otherwise. Defendant's initial settlement offer letter *and* the stipulation signed by
8 plaintiffs' counsel clearly indicated that the dismissal was "with prejudice." Defendant
9 represents that this is exactly the result it intended when it made the offer. If there was any
10 "miscommunication," it was a result of plaintiffs' counsel's carelessness. Plaintiffs' counsel
11 apparently failed to read not only the stipulation, but also defendant's correspondance. And,
12 although counsel did not draft the stipulation himself, he [or someone under his supervision] did
13 draft the proposed order filed therewith, and he [or someone under his supervision] explicitly
14 included the term "with prejudice" when titling both documents for the purpose of filing them in
15 the court's e-filing system. This is not a case of a "typo" or even a missed filing deadline, which
16 the court might readily categorize as "mistake" or "excusable neglect," but rather a pattern of
17 inattentiveness on the part of plaintiffs' counsel. In *Pincay*, the Ninth Circuit noted that "a

25 ³There is a threshold issue here that neither party raised in its papers or at the hearing. Under Rule
26 60(b), a court may relieve a party from a "final judgment, order, or proceeding." It is not entirely clear that a
27 voluntary dismissal under Rule 41(a)(1) fits into one of these categories. There is only thin authority among
28 courts in this district and circuit on this issue. See, e.g., *Noland v. Flohr Metal Fabricators*, 104 F.R.D. 83, 85
(D. Alaska 1984) (holding that despite the lack of court intervention, a voluntary dismissal under Rule 41(a)(1)
can be considered a "proceeding" for purposes of Rule 60(b)). Because in some circumstances leaving intact a
voluntary dismissal could produce an unjust result, this court agrees with *Noland* that Rule 60(b) relief may
sometimes be appropriate in cases of voluntary dismissal.

1 lawyer's failure to read an applicable rule is one of the least compelling excuses that can be
2 offered." *Pincay*, 389 F.3d at 859. Even less compelling is an attorney's failure to read
3 essential documents he himself signs and files.

4 The court must also consider the potential prejudice that would result from vacating the
5 voluntary dismissal. Defendant has already dismissed the NLRB claims against plaintiffs, as
6 promised.⁴ If the court altered the dismissal with prejudice as plaintiffs request (an outcome
7 that defendant did not agree to), plaintiffs could renege on their part of the bargain and
8 defendant would have little or no recourse. Plaintiffs would essentially get to "have their cake
9 and eat it too"—the benefit of the NLRB dismissal *and* the ability to refile the district court
10 claims. Such an outcome would prejudice defendant.

11 On the other hand, plaintiffs offer no facts suggesting that they will be harmed if the
12 dismissal with prejudice is left intact. They acknowledge that defendant has held up its end of
13 the agreement. And, since plaintiffs express no interest in trying their claims on their merits,
14 they have not been deprived of their opportunity for a trial on the merits as in the *Noland* case
15 they rely on. *See Noland*, 104 F.R.D. at 87. Moreover, if defendant in the future should again
16 engage in the same alleged trademark infringement, plaintiffs can simply file new claims based
17 on the new conduct. Overall, plaintiffs have provided the court with no reason why the
18 dismissal with prejudice will produce an unjust result in this case.

19 **V. Conclusion**

20 This case does not present facts that compel the court to act pursuant to Rule 60(b).
21 Accordingly, plaintiffs' motion for relief from the voluntary dismissal is denied.

22 **IT IS SO ORDERED.**

23 Dated: 2/8/06

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6 Counsel are responsible for distributing copies of this document to co-counsel who have
not registered for e-filing under the court's CM/ECF program.

7 Dated: 2/8/06

RNR

8 Chambers of Magistrate Judge Lloyd